

JUL 10 2003

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

MUHAMMAD GHULAMHAIDER
GWADURI; RAHIM MUHAMMAD
GWADURI; NADIA MUHAMMAD
GWADURI,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

No. 02-70629

Agency Nos. A71-842-149
A71-842-148
A71-842-147

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted June 5, 2003
Pasadena, California

Before: REINHARDT, O'SCANNLAIN, and FISHER, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

I.

Muhammad Ghulamhaider Gwaduri is a citizen of Pakistan who, along with his family, has resided in the United States since 1990.¹ On appeal, Gwaduri seeks review of the Board of Immigration Appeal's ("BIA") denial of his motion to remand for a rehearing on his adjustment of status and voluntary departure claims on the grounds that he received ineffective assistance of counsel and that the Immigration Judge ("IJ") did not properly consider all of the evidence.² On review, we find that the ineffective assistance received by petitioner requires a new hearing before an IJ on the issues of adjustment of status and voluntary departure; thus, we reverse the decision of the BIA and remand the case for further proceedings consistent with this decision.

II.

Jurisdiction

This case is governed by IIRIRA's transitional rules. Kalaw v. INS, 133 F.3d 1147, 1150 (9th Cir. 1997). While Section 309(c)(4)(E) of IIRIRA deprives

¹ Because the parties are acquainted with the facts and procedural history of this case, we repeat only an abbreviated summary here.

² In the December 20, 1996 deportation proceeding, which is the subject of this appeal, pursuant to an Order to Show Cause under Section 241(a)(1)(B), respondent was denied adjustment of status under Section 245 and, in the alternative, voluntary departure under Section 240B(b).

this court of jurisdiction to hear most discretionary decisions, it does not deprive us of jurisdiction to hear due process challenges to immigration decisions. Torres-Aguilar v. INS, 246 F.3d 1267, 1270 (9th Cir. 2001); Antonio-Cruz v. INS, 147 F.3d 1129, 1130 (9th Cir. 1998).

In deportation proceedings, “an alien’s right to be represented by counsel is based on the due process guarantees of the Fifth Amendment”; ineffective assistance of counsel results in a denial of due process when the proceeding is so fundamentally unfair that the alien is prevented from reasonably presenting his case. Iturribarria v. INS, 321 F.3d 889, 899 (9th Cir. 2003).

Gwaduri asserts that he was denied due process under the Fifth Amendment in his deportation proceeding because his counsel: (1) made a material error when filling out Gwaduri’s application for adjustment of status and voluntary departure, namely stating that he had not been convicted of a crime when by immigration law standards he had been; and (2) failed to prepare him to testify regarding his nolo contendere plea for misdemeanor sexual battery and the subsequent expungement of this plea from his record, thus leading the IJ to conclude, erroneously, that Gwaduri’s testimony as a whole was not credible. We have jurisdiction to hear Gwaduri’s challenge and to determine whether the proceedings, in fact, violated due process. See Agyeman v. INS, 296 F.3d 871, 885-887 (9th Cir. 2002)

(exercising jurisdiction over a discretionary denial of an adjustment of status and remanding the case for a new hearing where petitioner asserted a violation of his due process rights).

Procedural Requirements

_____After briefly noting Gwaduri's failure to follow all of the procedures in Matter of Lozada, 19 I & N Dec. 637, 639 (BIA 1988), the BIA proceeded to reach the merits of Gwaduri's ineffective assistance of counsel claim. In Lozada, the BIA held that a petitioner alleging ineffective assistance of counsel must: (1) provide an affidavit describing in detail the agreement with counsel; (2) inform the deficient counsel of the allegations and grant him an opportunity to respond; and (3) report whether a complaint of ethical or legal violations has been filed, and if not, why not. 19 I & N Dec. at 639. Here, while Gwaduri may have complied with the first two Lozada requirements, he did not comply with the third.

“While the requirements of Lozada are generally reasonable, they need not be rigidly enforced where their purpose is fully served by other means.” Castillo-Perez v. INS, 212 F.3d 518, 526 (9th Cir. 2000). Lozada was intended to ensure both that an “adequate factual basis exists in the record for an ineffectiveness complaint and that the complaint is a legitimate and substantial one.” Id. Where, as here, the “record of the proceedings themselves is more than adequate to serve

those functions,” there has been “substantial compliance” with the rule, and the prerequisites are superfluous. Id.; see also Rodriguez-Lariz v. INS, 282 F.3d 1218, 1227 (9th Cir. 2002) (holding the Lozada factors are “not rigidly applied, especially when the record shows a clear and obvious case of ineffective assistance”).

Because the administrative record shows that Gwaduri has a substantial claim that he was denied effective assistance of counsel, Lozada’s purpose is fully served. It was not necessary, therefore, for Gwaduri to strictly comply with the Lozada procedural requirements. In this connection, it is uncontested that Gwaduri’s counsel, Neville Asherson, erroneously stated on the immigration form he submitted on Gwaduri’s behalf that Gwaduri did not have any convictions, even though Asherson himself had been responsible for expunging the plea of nolo contendere and admitted as much to the IJ. The record also makes it plain that Asherson completely failed to prepare Gwaduri to testify regarding his nolo contendere plea³ and its subsequent expungement, undoubtedly because of

³ Despite the fact that Asherson knew that Gwaduri was under the mistaken belief that the nolo contendere plea had resolved the charges and that neither the plea nor any preliminary matters would appear on his record, he did not prepare Gwaduri to testify on this issue, or at all.

Asherson's own misunderstanding of the law.⁴ Consequently, Gwaduri had not been properly advised as to the effect of the two legal actions and was led to testify incorrectly, and in a confused manner, about their legal status.

Because this court has jurisdiction to determine whether the immigration proceedings violated due process and because Gwaduri presented a substantial claim of a due process violation, this court has jurisdiction to review the claim on the merits.

Due Process Claim

On the merits, the BIA determined that Gwaduri had not been prejudiced by his counsel's performance. We disagree.⁵ Prejudice is found "when the performance of counsel was so inadequate that it may have affected the outcome of the proceedings." Ortiz v. INS, 179 F.3d 1148, 1153 (9th Cir. 1999). Here,

⁴ Asherson's misunderstanding of the relevant law regarding the effect of an expungement for immigration purposes is evidenced by his having obtained the expungement in order to turn Gwaduri's case into what he considered to be a routine matter. In fact, he considered the hearing on the adjustment of status claim to be only a formality, as he advised the IJ. Thus, it is evident that Asherson neither thought it necessary to explain the legal consequences of the nolo plea or the expungement to Gwaduri nor understood their importance to the immigration proceedings himself.

⁵ We review de novo claims of due process violations in deportation proceedings. Rodriguez-Lariz, 282 F.3d at 1222; Abovian v. INS, 219 F.3d 972, 978 (9th Cir. 2001); Perez-Lastor v. INS, 208 F.3d 773, 777 (9th Cir. 2000).

Gwaduri has established that his counsel's inadequate performance resulted in an adverse credibility finding and the ultimate decision to deny him adjustment of status and voluntary departure. Thus, the decision must be reversed. See, e.g., Perez-Lastor v. INS, 208 F.3d at 777-78 (BIA decision upholding the IJ's adverse credibility determination must be reversed if an alien establishes that a due process violation potentially affected the outcome of the proceedings.).

Counsel's Performance

First, Asherson filed documents with the INS on Gwaduri's behalf containing information Asherson knew or should have known to be materially inaccurate. Counsel had a duty to know that a nolo contendere plea results in a conviction and that an expunged conviction is still considered a conviction for purposes of immigration law. See Iturribarria, 321 F.3d at 901 ("One reason that aliens . . . retain legal assistance in the first place is because they assume that an attorney will know how to comply with the procedural details that make immigration proceedings so complicated."). Competence requires not merely filing the necessary application on time, but also verifying that it contains accurate information. See, e.g., id. at 900 (submitting the wrong application for cancellation of removal constitutes ineffective assistance of counsel). This is especially true where, as here, the relevant information is in counsel's possession.

Second, Gwaduri's attorney failed to prepare him even minimally for his hearing before the IJ, thus allowing him to testify under a continuing misapprehension as to the significance of the legal terms at issue and without the ability to explain his prior erroneous answers. Gwaduri provided the BIA with an affidavit stating that Asherson had advised him that he could properly deny having any criminal convictions and that Asherson had not explained "what an expungement meant in terms of the deportation hearing." A competent immigration attorney is expected to prepare his client "thoroughly" on the issue of whether or not he has been convicted of a crime. See, e.g., 26 Am. Jur. Trials 327, § 19 ("The following items should be thoroughly reviewed with a client before his [immigration] hearing: 1. Does he have an arrest or conviction record?"). It is apparent from the record that Asherson failed to prepare his client on this issue, in part because of his misunderstanding of the law. As a result, Gwaduri was unable to understand or accurately answer the questions posed relating to the consequences of his plea of nolo contendere or his expungement.⁶

Prejudice

⁶ Particularly where it is clear from the record that an immigrant's command of the English language is limited, as here, it is crucial that counsel explain the legal terms to his client in layman's terms so that the immigrant may effectively respond to the questions posed.

There is a substantial likelihood that but for Asherson's errors, the IJ would have found Gwaduri to be a credible witness. The record indicates that the IJ's early discovery of Gwaduri's misstatements on his 1993 and 1996 adjustment of status applications and the continuing confusion in Gwaduri's testimony so tainted the proceedings that the IJ was unable to give Gwaduri a fair hearing and a reasonable opportunity to present his case. From the record, it appears that, as a result, the IJ took Gwaduri's disjointed responses to questions on even innocuous subjects as a sign of dishonesty, instead of as a sign of confusion or misunderstanding. In his decision, the IJ stated twice that Gwaduri had "lie[d] about [his conviction] to this Court in 1996 in his latest attempt to secure [an adjustment of] status." The IJ's contention is clearly erroneous. First, there was no benefit to Gwaduri to try to deceive the IJ about his prior conviction because Asherson had introduced the records of the conviction and confirmed their accuracy through Gwaduri at the outset of the hearing. Second, Gwaduri's statements at the 1996 hearing never sought to contradict the facts contained in these records; in context, they clearly refer only to Gwaduri's understanding of the legal consequences. Thus, if Gwaduri had been properly advised by counsel and understood the legal significance of his nolo plea and expungement, he could have

testified accurately and effectively on direct examination about the errors made inadvertently on his applications (including the application prepared by Asherson), instead of giving inaccurate and contradictory responses to questions on cross-examination from the government and the IJ. In such case, the IJ might have believed Gwaduri's reasonable assertion that, as a new immigrant with only one offense, he had been under the mistaken impression that his bargain with the government, a plea of nolo contendere with no time served, had served to clear his record. As a result, the IJ might well have found Gwaduri to be a credible witness.

In denying petitioner's motion to remand, the BIA also found that because the IJ's decision was supported by other factors, including that Gwaduri had worked without the permission of the INS and had been convicted of the misdemeanor (expunged from his record), Gwaduri failed to establish prejudice.⁷

Gwaduri, however, need not show that but for the violation of due process he

⁷ The IJ also based his decision on the "vague, non-responsive, inconsistent answers" concerning the discrepancies in addresses and places of employment in the various applications Gwaduri had submitted to the INS. It is well-established that inconsistencies of less than substantial importance for which a plausible explanation is offered cannot form the basis for an adverse credibility finding. Bandari v. INS, 227 F.3d 1160, 1166 (9th Cir. 2000); See also Osorio v. INS, 99 F.3d 928, 932 (9th Cir. 1996) ("‘minor omission,’ ‘minor inconsistencies,’ and ‘trivial errors’ [] cannot support an adverse credibility finding"). Although Gwaduri appeared confused and answered many questions in broken English, he did offer an explanation for these minor inconsistencies that, if given by an otherwise credible witness, might well have been accepted by the IJ.

would have been granted relief. He need merely show that the deficiency “may have affected the outcome of the proceedings.” Ortiz, 179 F.3d at 1153; see also Perez-Lastor, 208 F.3d at 780 (“An alien suffers prejudice if the violation potentially . . . affects the outcome of the proceedings.”) (internal citations omitted). It is apparent from the IJ’s decision that his principal reason for denying Gwaduri relief was his determination that Gwaduri was a dishonest person.⁸ Thus, it is likely that if this credibility determination had gone in Gwaduri’s favor, the IJ, in his discretion, would not have denied relief solely on the basis of the other less important factors.

In conclusion, if Asherson’s performance had not been deficient, the IJ might have afforded Gwaduri the benefit of the doubt that he had been mistaken about whether a plea of nolo contendere was a conviction when responding to previous written inquiries and might well not have concluded that Gwaduri was

⁸ It should be noted that during his deportation hearing Gwaduri’s counsel withdrew a seemingly meritorious application for asylum. This application contained significant evidence that Gwaduri and his family would be in grave danger if they returned to Pakistan and that Gwaduri had been persecuted and tortured for his political activities in attempting to democratize the country. This information should have been presented by counsel in the context of the adjustment of status claim to further establish “humanitarian need.” See, e.g., Jacinto v. INS, 208 F.3d 725, 734 (9th Cir. 2000) (failure to inform petitioner that she could present evidence, in the form of affirmative testimony, can establish prejudice and a due process violation).

still being dishonest at the time of the hearing; in such case, the IJ likely would have made a different, and favorable, credibility determination.⁹ Because Asherson's inadequate performance "may have affected the outcome of the proceedings," we reverse the BIA's decision and remand the case with instructions to order a rehearing before an IJ on Gwaduri's adjustment of status and voluntary departure claims. Ortiz, 179 F.3d at 1153.¹⁰

REVERSED and REMANDED for further proceedings in conformance with this disposition.

⁹ The IJ also found Gwaduri statutorily ineligible for voluntary departure because he had given false testimony for the purpose of obtaining a benefit under the immigration laws. The reasons that require reversal and remand with respect to the adjustment of status application are equally applicable here.

¹⁰ In view of our holding, we do not reach Gwaduri's contention that the IJ and the BIA failed to weigh certain favorable factors in their analysis. We note, however, that in any event we lack jurisdiction over that question. Sanchez-Cruz v. INS, 255 F.3d 775, 779 (9th Cir. 2001); Torres-Aguilar v. INS, 246 F.3d at 1270.